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In the Supreme Court of the United States

No. [redacted] 2

OCTOBER TERM, 1954.

HOLOPHANE COMPANY, INC.,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

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TABLE OF CONTENTS.

Introduction ---- 1

Opinions Below ---- 2

Jurisdiction ---- 2

Statute Involved ---- 3

Questions Presented ---- 4

Statement of the Case ---- 5

The Questions Presented Are Substantial ---- 12

Conclusion ---- 17

Appendices:

A. Findings of Fact and Conclusions of Law of District Court ---- 18

B. Memorandum of District Court ---- 28

C. Order of District Court on Defendant's Motions 29

D. Judgment and Decree of District Court ---- 30

Stipulation Amending Judgment and Decree ---- 39

TABLE OF AUTHORITIES.

Cases.

American Banana Company v. United Fruit Company, 213 U. S. 347 ---- 14

British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd. [1952], 2 All E. R. 780 (C. A.), L. R. [1955] 1 Ch. 37 ---- 14, 16

Ethyl Gasoline Corporation, et al. v. United States, 309 U. S. 436 ---- 3

United States v. Aluminum Company of America, 148 F. 2d 416 (2d Cir. 1945) ---- 14

United States v. General Electric Co., 82 F. Supp. 753 (D. N. J. 1949); 115 F. Supp. 835 (D. N. J. 1953) ---------- 14, 15

United States v. Griffith, et al., 334 U. S. 100 ---------- 3

United States v. United States Gypsum Co., et al., 333 U. S. 364 ---------- 3

Articles.

American Journal of Comparative Law, Autumn, 1953, page 445 ---------- 13

C. C. H. *Antitrust Law Symposium* 1953, page 44 ---- 13, 16

C. C. H. *Antitrust Law Symposium* 1953, page 123 ---- 13

14 *Ohio State Law Journal* 252 (1953) ---------- 13

Report of the Attorney General's National Committee to Study the Antitrust Laws ---------- 16

63 *Yale L. J.* 639 (1954) ---------- 13

63 *Yale L. J.* 655 (1954) ---------- 14

Statutes.

Expediting Act of February 11, 1903, Section 2, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989 ---------- 3

Sherman Act of July 2, 1890, Sections 1 and 4, 26 Stat. 209, as amended, 15 U. S. C. 1 and 4 ---------- 2, 3

Rules.

Rules 13(2) and 15 of the Revised Rules of the Supreme Court of the United States ---------- 1

Rules 59 and 60 of the Federal Rules of Civil Procedure ---------- 9

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vs.

UNITED STATES OF AMERICA,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

INTRODUCTION.

The appellant, Holophane Company, Inc., a corporation organized under the laws of the State of Delaware and engaged in the manufacture of prismatic glassware in Newark, Ohio, appeals from the judgment and decree of the United States District Court for the Southern District of Ohio, Eastern Division, entered February 8, 1954. This Jurisdictional Statement is submitted in compliance with Rules 13(2) and 15 of the Revised Rules of the Supreme Court of the United States to demonstrate that this Honorable Court has jurisdiction of the appeal and that the questions presented are so substantial as to require plenary consideration.

OPINIONS BELOW.

There have been no opinions rendered herein. There are no companion cases. The findings of fact and conclusions of law entered by the District Court are attached hereto and marked Appendix A.

JURISDICTION.

(i) The case is a civil action brought by the United States under Section 4 of the Sherman Act to prevent and restrain alleged violations of Section 1 thereof.

(ii) The judgment and decree sought to be reviewed was entered February 8, 1954. Thereafter on February 18, 1954, appellant served and on February 19, 1954, filed its motion for new trial, to admit additional testimony, for amendment of and additional findings of fact and conclusions of law and for altering or amending the judgment. On April 2, 1954, defendant served and on April 5, 1954, filed a supplemental motion for altering or amending the judgment together with a supporting affidavit.

On February 9, 1955, the District Court mailed to counsel a paper styled "Memorandum," signed by the Judge, marked "Copy" and stamped "Filed Feb. 9, 1955. Wm. Robinett, Jr., Clerk." The memorandum found that appellant's motions for new trial and other relief were "not well taken and should be overruled," except for the correction of a date. A notice of appeal was filed in the District Court for the Southern District of Ohio, Eastern Division, on April 9, 1955. Thereafter it developed that no order had been entered upon the memorandum of February 9, 1955. On June 2, 1955, an order conforming to such memorandum was filed nunc pro tunc February 9, 1955. On June 4, 1955, a second notice of appeal was filed in the District Court for the Southern District of Ohio, Eastern Division, identical with the first notice of appeal

except for recitation of the filing of the order or journal entry of June 2, 1955, to take effect as of February 9, 1955. Copies of the memorandum of February 9, 1955, and the order filed June 2, 1955, nunc pro tunc February 9, 1955, are annexed hereto and marked Appendix B and Appendix C, respectively.

(iii) The jurisdiction of the Supreme Court to hear this appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

(iv) The following decisions, *inter alia*, sustain the jurisdiction of the Supreme Court in this case:

United States v. Griffith, et al., 334 U. S. 100;
United States v. United States Gypsum Co., et al., 333 U. S. 364;
Ethyl Gasoline Corporation, et al. v. United States, 309 U. S. 436.

STATUTE INVOLVED.

Sections 1 and 4 of the Sherman Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1 and 4, so far as here pertinent, read:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *"
>
> "4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; * * *"

QUESTIONS PRESENTED.

The questions presented by this appeal are:

1. Are contracts imposing territorial and other restrictions upon parties to the sale of a business *per se* violative of the antitrust laws?

2. If the answer to the preceding question is in the negative, do such contracts become *per se* unlawful when they are made between corporations formed under the laws of different countries, including the United States, and divide the geographical area of the world into markets among the contracting parties?

3. If the answer to each of the foregoing questions is in the negative, was it not a proper ancillary restraint for Holophane, Ltd., a British corporation controlled by a common dominant individual shareholder with La Societe Anonyme Francaise Holophane, a French corporation, to impose territorial and other restrictions upon the American purchasers of the wholly owned subsidiary of Holophane, Ltd., which is the predecessor of the appellant herein?

4. Was it proper for the Court to enjoin Holophane Company, Inc., as it did in paragraph VIII B, of the judgment and decree from agreeing to exchange patents, trademarks, trade-names, technological information or know-how or commercial information in any country with Holophane, Ltd., or La Societe Anonyme Francaise Holophane?

5. Is there power in a United States District Court, which has jurisdiction solely over the American member of an illegal cartel arrangement, upon determining to enjoin future adherence to the contracts upon which said cartel arrangement is based, to order the American defendant to perform affirmative acts in carrying on business

in the nations of the other parties to said contracts in violation of the terms thereof?

6. If such power as is described in the immediately preceding question exists, should it ever be exercised?

7. If such power as is described in the two immediately preceding questions exists, should it be exercised in this case and thereby expose Holophane Company, Inc. to potential suits for damages or injunctive relief in the courts of foreign nations in which the decree of the United States District Court will not or may not be a defense?

STATEMENT OF THE CASE.

The appellant, Holophane Company, Inc., a Delaware corporation, was the sole defendant below. The complaint named as co-conspirators Holophane, Limited, hereafter sometimes called Limited, a British joint stock company, and La Societe Anonyme Francaise Holophane, hereafter sometimes called Francaise, a French corporation.

The complaint charged that appellant combined and conspired with the co-conspirators to violate Section 1 of the Sherman Act by allocating territories, by restricting exportation and by agreements relating to trade-marks, inventions, developments and similar matters. Appellant's answer set forth three defenses: (1) failure to state a claim upon which relief could be granted; (2) denial of the combination and conspiracy charged and (3) reasonableness of the restraints imposed as incident to the sale of a business and the goodwill thereof.

Holophane Company, Inc., manufactures prismatic glassware. It also assembles lighting fixtures embodying prismatic glass. Both of the co-conspirators either manufacture or sell similar products except that neither has as full a line as appellant. Although appellant sells prismatic

glassware and lighting fixtures, these physical products are made as a service to appellant's engineering organization. The rendition of scientific lighting service is the real business of the appellant. All of its salesmen being trained engineers.

The early history of the Holophane enterprise is indicated in the following quotation from a stipulation of facts by counsel at trial:

> "We, the attorneys for the respective parties do hereby stipulate that about 1892 Professor Andre Blondel developed a new type of prismatic glass globe in Paris, France. An American, Mr. Otis A. Mygatt, after meeting Professor Blondel, and becoming interested in this prismatic glass globe, formed the Holophane Glass Company of New Jersey in 1898 to develop scientific lighting service and to manufacture and sell this new development and related developments in prismatic lighting glassware.
>
> "About 1912 Mr. Mygatt organized an English Company called Holophane Limited, and he turned over to that company all of the stock of the Holophane Glass Company. Mr. Mygatt later formed La Societe Anonyme Francaise Holophane of France. At that time he was a resident of France. At the time of the sale of the Holophane Glass Company to the American interests described below, Mr. Mygatt owned the controlling stock of Holophane Limited and of La Societe Anonyme Francaise Holophane.
>
> "In 1925 Messrs. Charles Franck and Joel B. Liberman, Americans, who were interested in the Holophane Glass Company, as manager and attorney respectively, got together a group from the management and their friends to buy the Holophane Glass Company from Holophane Limited. This purchase was accomplished in 1925."

At the time of the 1925 purchase of the wholly owned American subsidiary, Holophane Glass Company, from

Limited by appellant's predecessor, Otis A. Mygatt was the controlling shareholder not only of both Limited and Francaise but also through Limited, of the American subsidiary. Charles Franck was resident American manager and had been for approximately nine years. The general manager of the parent corporation, Limited, had been one H. Hepworth Thompson for a similar period. Although the sale was negotiated by Mr. Liberman, who took an option in his own name, subsequent agreements were executed between the new American company, appellant's predecessor, and Limited by Franck and Thompson. Mr. Franck is now president of appellant.

In 1921 Limited granted an exclusive license to Francaise to make and sell prismatic glassware under existing and future patents in a defined territory. The agreement was in effect at the time Limited sold its American subsidiary in 1925 and has been extended or renewed in substantially the same terms to date. These contracts include provisions against export of Holophane glassware from the territory of Francaise to that of Limited and vice versa. Other terms require the marking of goods with the name "Holophane" and the exchange of developments and improvements.

The first meeting of the incorporators of appellant's predecessor was held September 11, 1925. Immediately after approval by the incorporators of Mr. Liberman's proposal to assign his contract with Limited for the purchase of all outstanding shares of Holophane Glass Company to the new corporation, an offer by Otis A. Mygatt to purchase all of the authorized preferred stock in the new corporation for cash was accepted. On September 15, 1925, appellant's predecessor entered into a trading agreement with Limited. The agreement was for an indefinite term. The chief points of said agreement were:

(a) The territory of the defendant's predecessor defined as that part of the Continent of America north the Panama Canal and adjacent islands (not including th West Indies), the Philippine Islands, the Republic of Cub and the Empire of Japan. The territory of "Limited" defined as the whole of the world except the territory the defendant's predecessor and the Republic of Franc and its Colonies.

(b) Each party agrees to use every means in i power to prevent the exportation from its territory int the territory of the other, of products sold or manufa tured by it, except with the consent in writing of tha party.

(c) Each party agrees that it will not carry on trad in the territory of the other, except at the request and fo the benefit of that party.

(d) Each party agrees that it will neither apply fo nor obtain patent or trade-mark protection in the territor of the other, except at the request and for the benefit that party.

(e) Each party agrees to communicate and assig every invention, design, discovery or improvement an trade-mark to the other, and render any aid necessary t enable the other to secure proper protection in its te ritory.

(f) Each party agrees to supply to the other, whe requested, Holophane products at a price equal to factor cost, plus 30%, delivered at place of manufacture.

(g) The agreement defines "Holophane products" a any product sold under the trade-mark or trade-nam "Holophane" and/or manufactured or sold by either com pany.

On June 29, 1926, a patent and manufacturing agreement similar to that just outlined was entered into between appellant and Francaise. The agreement was executed as of September 15, 1925. Mr. Liberman who negotiated the purchase of the American property had said that he could offer a similar arrangement with Francaise in the same letter in which he described the trading agreement between appellant and Limited.

After considerable correspondence appellant in 1944 acquired the right to sell in the South American territory theretofore held by Limited for the sum of $40,300.00. With relatively small modifications the so-called trading agreement between appellant and Limited and the patent and manufacturing agreement between appellant and Francaise remained in operation at the time of the trial.

The trial before the Honorable Mell G. Underwood was held June 2 and 4, 1952. Argument on the proposed findings of fact and conclusions of law and upon the proposed forms of decree was held May 8, 1953. The judgment and decree of the Court was entered February 8, 1954. A copy is attached hereto as Appendix D. The findings of fact and conclusions of law filed the same day have already been mentioned (see Appendix A). By stipulation of counsel approved by the Court, the judgment and decree was amended February 9, 1955. A copy of the amending stipulation is attached hereto and marked Appendix E. On February 9, 1955 the District Court overruled appellant's various motions under Rules 59 and 60 of the Federal Rules of Civil Procedure for a new trial and other relief as heretofore described under Jurisdiction (ii) at page 2 above.

The judgment and decree cancelled specified agreements between appellant and Limited or Francaise and enjoined acts which might lead directly or indirectly to a

continuation or re-establishment of the restrictive practices found violative of Section 1 of the Sherman Act. In addition the decree included two paragraphs directing affirmative acts and hence mandatory in their nature. These sections in full and as amended by stipulation in XI A are as follows:

"X.

"Defendant is ordered and directed:

"A. To cancel and terminate in all contracts and agreements with and invoices to customers and distributors such provisions as restrict or prevent said customers or distributors from reselling said products in any foreign country;

"B. To notify all its customers and distributors that the defendant does not restrict or restrain the exportation or resale of said products manufactured or sold by the defendant in or to any foreign country;

"C. To send a letter of notification to 'Limited' and 'Francaise' enclosing a copy of this Judgment and informing the aforesaid companies that they are no longer obligated not to export goods to any country included in the territory of the defendant, including the United States.

"D. To file a report with the Clerk of this Court within three months from the date of this Judgment, showing action taken in compliance with the terms of this Paragraph X.

"XI.

"Defendant is ordered and directed:

"A. To use reasonable efforts, including but not limited to the use of present or subsequent distributors or wholly-owned subsidiaries, to promote the sale and distribution of said products in foreign markets, including the territories of 'Limited' and 'Francaise.' Nothing contained in this paragraph shall be construed as requiring the exportation by the defendant

of any such products in violation of the valid patent or trade-mark or trade-name rights of any person in any foreign country. If, because of such valid patent or trade-mark or trade-name rights, such exportation can be made into certain countries only by means of unmarked glass or the adoption of another trade-mark or trade-name for such exportation, then the defendant shall, within one year from the date hereof, have available sufficient quantities of unmarked glass or glass marked with a new trade-mark to be distributed under a new trade-name, if necessary, to meet reasonable anticipated foreign demand.

"B. To offer said products for sale and export to the territories of 'Limited' and 'Francaise' at prices and upon terms and conditions of sale not discriminatory as compared to those offered to purchasers for use or resale in the United States.

"C. To take the following specific steps to promote and develop export sales of said products:

"(1) To circularize within one year from the date of this Judgment known potential distributors of said products in the territory of 'Limited' and 'Francaise,' seeking to employ their services in selling and distributing said products.

"(2) Beginning six months from the date of this Judgment and for a period of five years thereafter, to insert advertisements at reasonable intervals in trade journals of appropriate circulation in all countries in which said products manufactured by 'Limited' or 'Francaise' are sold in substantial quantities, of the manufacture and availability for sale of said products.

"(3) To circularize within one year from the date of this Judgment all persons who from January 1, 1948 to date of this Judgment have made written inquiry to the defendant respecting the purchase or distribution of said products, exported to any country in the territory of 'Limited' or 'Francaise' in-

forming them of the manufacture and availability for sale of said products.

"(4) To respond in writing to all persons who from the date of Judgment make written inquiry to the defendant respecting the purchase or distribution of said products for export to the territory of 'Limited' or 'Francaise,' advising them of the manufacture and availability for sale of said products.

"D. To file a report with the Clerk of this Court each year for a period of five years from the date of this Judgment, showing action taken in compliance with the terms of this Paragraph XI."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

Passing over the first four enumerated questions involved in this appeal without waiving or abandoning them, appellant urges the high importance of the last three of said questions. They are as follows:

"5. Is there power in a United States District Court, which has jurisdiction solely over the American member of an illegal cartel arrangement, upon determining to enjoin future adherence to the contracts upon which said cartel arrangement is based, to order the American defendant to perform affirmative acts in carrying on business in the nations of the other parties to said contracts in violation of the terms thereof?

"6. If such power as is described in the immediately preceding question exists, should it ever be exercised?

"7. If such power as is described in the two immediately preceding questions exists, should it be exercised in this case and thereby expose Holophane Company, Inc. to potential suits for damages or injunctive relief in the courts of foreign nations in which the decree of the United States District Court will not or may not be a defense?"

In essence the foregoing raise the large question of the extent to which an American court having jurisdiction over but one party to an alleged cartel agreement should exercise its jurisdiction *in personam* to order that defendant to do affirmative acts abroad in violation of its contractual obligations valid in the countries in which it is ordered to perform such affirmative acts. The importance of the question has been brought into sharp focus in recent years with the effort by the Antitrust Division of the Department of Justice to extend the frontiers of applicability of the antitrust laws beyond national boundaries, in other words, to establish an extraterritorial jurisdiction for the antitrust laws. Cp. "The Oil Case," *CCH Antitrust Law Symposium* 1953, page 123.

Legal writers have repeatedly touched upon the complicated problem of extraterritoriality in American antitrust policy. International meetings have undertaken to approach the problem through negotiation. Illustrative articles are:

"Regulation of Monopolistic Cartelization"
by Corwin D. Edwards,
14 *Ohio State Law Journal* 252 (1953)

"Restrictive Business Practices: Comparative Legislation and the Problems that Lie Ahead"
by Sigmund Timberg,
The American Journal of Comparative Law, Autumn, 1953, page 445

"U. S. Antitrust Process Beyond Our Borders, Jurisdiction and Comity"
by Hazen Hansard,
C. C. H. Antitrust Law Symposium 1953, page 44

"International Law and Extraterritorial Application of the Antitrust Laws"
by George Winthrop Haight,
63 *Yale L. J.* 639 (1954)

"Sources of Conflict Between International Law and the Antitrust Laws"

by William Dwight Whitney,

63 *Yale L. J.* 655 (1954)

Although dealing with the substantive effect of the Sherman Act and not the extent of relief to be ordered for a violation thereof, *American Banana Company v. United Fruit Company*, 213 U. S. 347, recognized the implications of extraterritoriality. In holding the acts there involved not to be within the scope of the Sherman Act, the Court pointed out that they occurred outside the jurisdiction of the United States and commented, "It is surprising to hear it argued that they are governed by the act of Congress." (p. 355.) Later the Court quoted with approval, "All legislation is *prima facie* territorial." (p. 357.)

In two more recent cases lower courts have recognized the potential for international complications in applying the Sherman Act to foreign trade:

United States v. Aluminum Company of America, 148 F. 2d 416 (2d Cir. 1945);

United States v. General Electric Co., 82 F. Supp. 753 (D. N. J. 1949); 115 F. Supp. 835 (D. N. J. 1953).

The dilemma inherent in an effort to make antitrust laws applicable abroad is shown in *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* [1952], 2 All E. R. 780 (C. A.), L. R. [1955] 1 Ch. 37. In the earlier citation an interlocutory injunction was approved by the Court of Appeals restraining the defendant from complying with an order of the District Court for the Southern District of New York. Imperial Chemical Industries, Ltd. (I. C. I.), defendant, had been ordered by the American court to re-assign certain British nylon pat-

ents to duPont. 100 F. Supp. 504 (1951), 105 F. Supp. 215 (1952). British Nylon Spinners, Ltd. (B. N. S.), had a contract with I. C. I. for an exclusive license under the British patents. In the trial upon the merits I. C. I. was ordered specifically to perform its contract with B. N. S. to grant the license. The British courts were thoroughly aware of the American order and sensitive to the many problems created thereby for British citizens and courts.

In *United States v. General Electric Co.*, cited above, Philips, a Dutch corporation properly before the Court, was found to have been a party to an arrangement permitting unlawful domination by General Electric Co. of the domestic market for incandescent lamps. Nevertheless the Court recognized the delicacy of the international problems involved in exercising its *in personam* jurisdiction over Philips. In its opinion on the decree the District Court approved a paragraph proposed by Philips not requiring acts outside this country contrary to local law,

> "* * * as a safeguard to its protection from being caught between the jaws of this judgment and the operation of the laws in foreign countries where it does business." (115 F. Supp. 835, 878.)

In the present case appellant is ordered by paragraph XI A of the judgment and decree to sell in the areas cultivated by Limited and Francaise. The mere fact that the decree recognizes there may be patent and trade-mark or trade-name barriers is not enough because any selling by appellant in those areas violates contracts unilaterally dissolved by an American court having jurisdiction over only the American defendant. To Limited and Francaise the contracts are binding obligations upon appellant. Compliance by appellant with XI A of the judgment and decree as implemented by the balance of such section would re-

quire appellant to expose itself to suit in foreign courts where the decree below might not be recognized. Thus appellant might readily find itself choosing between "the jaws of this judgment and the operation of the laws in foreign countries" where it is ordered to do business.

Comity between nations does not require acceptance by British or French courts of an American order destroying commercial rights of British and French corporations. Comity is a two-way street leading from self-restraint and discipline by the tribunal issuing the order to deference and respect by the foreign court asked to accept or enforce that order. *CCH Antitrust Law Symposium* 1953, page 44. The British point of view on comity was well expressed by Lord Justice Denning in the first *British Nylon Spinners* case.

> "It would be a serious matter if there was a conflict between the Orders of the Courts of the United States and the Orders of the courts of this country. The Writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here." [1952] 2 All E. R. 780, 784.

The recent *Report of the Attorney General's National Committee to Study the Antitrust Laws* devoted the first section of its chapter on "Trade or Commerce * * * with Foreign Nations" to "Extraterritorial Jurisdiction." That section concludes at page 76 with the following:

> "Finally, in formulating decree provisions, sound judicial discretion requires, in the language of the *General Electric* case, inclusion of 'safeguards' to protect any defendant 'from being caught between the jaws of * * * [any] judgment and the operations of law in foreign countries where it does its business.' For we must assume, as *Alcoa* suggests, that Congress did not intend the 'general words' of the Sherman Act

to be read 'without regard to the limitations customarily observed by nations upon the exercise of their powers.' "

CONCLUSION.

Appellant urges that probable jurisdiction should be noted because of the substantial nature of the questions presented and the public interest in the extraterritorial application of the antitrust laws.

Respectfully submitted,

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APPENDIX A.

CIVIL No. 2659.

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HOLOPHANE COMPANY, INC.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed Feb. 8, 1954. Howard E. Parker, Clerk.)

This is an action by the United States of America to prevent and restrain the defendant, Holophane Company, Inc., from engaging in an allegedly unlawful combination and conspiracy and from being a party to contracts allegedly in restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Anti-trust Act, 26 Stat. 209 (1890), 15 U. S. C. Section 1 (1940).

The case was tried before the Court, and the Court having carefully considered the evidence, together with the pleadings and briefs, and being fully advised in the premises, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1. The defendant is a corporation, organized and existing under the laws of the State of Delaware, and maintaining offices in New York, New York, and a factory

in Newark, Ohio. It is engaged in the manufacture and sale of prismatic glassware and illuminating appliances containing prismatic glassware.

2. The defendant transacts business and maintains a factory and is found within the Eastern Division of the Southern District of Ohio.

3. Holophane Limited, hereinafter referred to as "Limited," a joint stock company organized and existing under the laws of the United Kingdom with offices and principal place of business in London, England, is named as a co-conspirator. It is engaged in the sale of prismatic glassware and the manufacture and sale of illuminating appliances containing prismatic glassware.

4. La Societe Anonyme Francaise Holophane, hereinafter referred to as "Francaise," a corporation organized and existing under the laws of France, with offices and principal place of business in Paris, France, is named as co-conspirator. It is engaged in the manufacture and sale of prismatic glassware and illuminating appliances containing prismatic glassware.

5. Prismatic glassware includes reflectors, refractors, lenses and lens plates, bearing configurations or prisms in the form of circles or lines or both, and is used to control the distribution and direction of artificial light. Prismatic glassware incorporated into illuminating appliances may be used to direct artificial light to a small area or to diffuse artificial light over a wide area.

6. Illuminating appliances containing prismatic glassware are highly efficient and effective means of lighting factories, offices, schools, stores, hospitals, art galleries and radio broadcasting studios. Prismatic glassware is also used in transportation, marine, aviation, street and traffic lighting fixtures.

7. In 1948, the year prior to the filing of the complaint in this action, the total gross sales by the defendant of prismatic glassware and prismatic glassware fixtures were $3,517,365.75, of which, glassware sales amounted to $2,091,962.61 and fixture sales amounted to $1,425,402.14.

8. In 1921 "Limited" by patent license agreement granted to "Francaise" the right to make and the sole, full and exclusive license to sell prismatic glassware under the existing and future patents of "Limited" in Belgium, Spain, Portugal, Switzerland and Italy. The term of the agreement was five years from January 1, 1920, with option in "Francaise" to renew for a like term. "Francaise" exercised its option. In addition to royalty provisions, the license agreement provided that (a) articles manufactured under the license would be marked with the name "Holophane"; (b) "Francaise" would not use inventions, designs, or the trade name "Holophane" except in accordance with the license; (c) the parties would mutually exchange discoveries and improvements; (d) "Francaise" would prevent exportation from the licensed countries to other areas; (e) "Limited" would prevent the export into France or the licensed countries of Holophane goods.

This license, executed in 1921, was renewed with basically the same provisions in 1927, 1929, 1936 and 1940. The continuity of the license agreements was disrupted by the war, but a new license with similar terms was executed in 1947.

9. Otis A. Mygatt held the controlling stock interest in both "Limited" and "Francaise" in 1925. "Limited" held all of the stock of the Holophane Glass Co., Inc. Each company was separately managed. In addition, Charles Franck, now President of defendant, was Resident Manager of the American company from 1916 to 1925

and H. Hepworth Thompson, its General Manager. Mr. Thompson was also General Manager of "Limited." There is no evidence that Mygatt participated in the management of any of the companies.

10. In 1925, a group of executives, engineers and employees of the aforementioned Holophane Glass Company, Inc., organized the predecessor company of the defendant, for the purpose of purchasing the Holophane Glass Company, Inc., from "Limited." This group, which comprised the persons then actively engaged in the management of the Holophane Glass Company, Inc., was under the leadership of Charles Franck, then Resident Manager of the company and currently President of the defendant, and Joel B. Liberman, attorney for the company. On June 6, 1925, Joel B. Liberman obtained from "Limited" an option to purchase the stock of Holophane Glass Company, Inc., which he assigned to the aforementioned predecessor company of the defendant. The purchase price was $1,000,000. The net worth of Holophane Glass Company, Inc., was $1,197,312 for its land, buildings and equipment, the good will not having been evaluated.

11. After its purchase from "Limited," Holophane Glass Company, Inc., the New Jersey corporation, was merged into Holophane Illuminating Company, Inc., its purchaser, a New York corporation. The name of the latter was immediately changed to Holophane Glass Company, Inc., i.e. the name of the original American Company. In 1926 the New York corporation again changed its name to Holophane Company, Inc. In 1929 Holophane Company, Inc., the New York corporation, was merged into defendant, a Delaware corporation of the same name.

12. On September 15, 1925, the defendant's predecessor and "Limited" entered into a trading agreement

which was characterized by Joel B. Liberman as a reciprocal trade and patent agreement of great value. It was signed on behalf of "Limited" by H. Hepworth Thompson as Managing Director, and for the defendant's predecessor by Charles Franck as Vice-President. It contained no termination date, and was in effect at the time of the trial.

The essential features of the agreement are as follows:

(a) The territory of the defendant's predecessor is defined as that part of the Continent of America north of the Panama Canal and adjacent islands (not including the West Indies), the Philippine Islands, the Republic of Cuba, and the Empire of Japan. The territory of "Limited" is defined as the whole of the world except the territory of the defendant's predecessor and the Republic of France and its Colonies.

(b) Each party agrees to use every means in its power to prevent the exportation from its territory into the territory of the other, of products sold or manufactured by it, except with the consent in writing of that party.

(c) Each party agrees that it will not carry on trade in the territory of the other, except at the request and for the benefit of that party.

(d) Each party agrees that it will neither apply for nor obtain patent or trade mark protection in the territory of the other, except at the request and for the benefit of that party.

(e) Each party agrees to communicate and assign every invention, design, discovery or improvement and trade mark to the other, and render any aid necessary to enable the other to secure proper protection in its territory.

(f) Each party agrees to supply to the other, when

requested, Holophane products at a price equal to factory cost, plus 30%, delivered at place of manufacture.

(g) The agreement defines "Holophane products" as any product sold under the trade mark or trade name "Holophane" and/or manufactured or sold by either company.

13. On June 29, 1926, defendant's predecessor and "Francaise" entered into a patent and manufacturing agreement which had been prepared by Joel B. Liberman. The agreement was made effective as of September 15, 1925; contains no termination date; and in all of its essential terms is identical to the trading agreement between defendant's predecessor and "Limited." The agreement defines the territory of "Francaise" as the Republic of France and its Colonies. It was signed on behalf of the defendant's predecessor by Charles Franck as Vice-President and on behalf of "Francaise" by Andre Froget as L'Administrateur-Delegue.

14. When Joel B. Liberman, one of the founders of Holophane Illuminating Company, Inc., offered to sell said company, the contract which he had negotiated in his own name with "Limited" to buy Holophane Glass Company, Inc., the New Jersey corporation, Mr. Liberman stated that he was able and did thereby offer similar advantages with "Francaise." The record, however, disclosed no specific obligation upon the defendant to enter into the agreement with "Francaise."

15. The restraints imposed by the agreements apply to many countries of the world in which none of the companies have ever carried on business.

Although the agreements cover the entire world, the defendant admits that in 1925 there were many countries

in the world in which neither the defendant, "Limited" or "Francaise" carried on business; other countries in which they made only occasional or isolated sales; and that even to date there are a number of countries in which none of the three companies had made any substantial effort to develop a market.

The agreements contain schedules listing those countries in which the parties had patent and trade name and mark protection in 1925 and 1926. The schedules reveal that there were many countries within the territories of the defendant and "Limited" in which no patent or trade name or mark protection was listed.

16. The trading agreement between the defendant and "Limited" has been modified and elaborated upon in each of the following instances:

(a) In 1927 an understanding between the parties modified the trading agreement to the extent that "Limited" agreed to order 50% of its refractor requirements for South America from the defendant, and to pay a bonus to the defendant on the remaining 50%. It further provided for a free interchange of commercial and engineering information, including the right to visit and study the plants of each. After being renewed twice, this understanding was cancelled by "Limited" in 1933.

(b) In 1944 "Limited" sold to the defendant all of its rights to sell Holophane products in the South American territory; in exchange for $40,300 and an agreement for the mutual exchange of all research, technical, manufacturing and commercial information. The object of this transaction was to cement the relations between the two companies. On February 1, 1944, the parties entered into an agreement which extended the terms of the 1925 agreement to include South America in the territory of de-

fendant. The parties also took this opportunity to reframe the definition of Holophane products to assure the application of the restraints to all products manufactured and sold by them, including products not subject to existing patents or trade marks, and products not marked "Holophane." Also in furtherance of their mutual interests, they agreed to a full and free exchange of all research, technical, manufacturing and commercial information.

The parties also agreed that in any future agreement with "Francaise," "Limited" would insert a provision preventing "Francaise" from exporting into South American Territory, although at the time France was occupied by Germany, and the parties were uncertain as to the future organization of "Francaise" after the war. In 1947, when "Limited" again granted a patent license to the re-established "Francaise," this obligation was fulfilled by a provision in that license that neither "Limited" nor "Francaise" would permit the exportation of their products into the territory of the defendant.

(c) On June 11, 1945, defendant and "Limited" entered into an inter-company buying agreement, which elaborated upon that provision in the 1925 trading agreement which required the parties to supply each other with Holophane products. The new arrangements permitted a party to ship to and invoice directly, a customer located in the territory of the other but only at the request and for the benefit of the party owning the territory. It further permitted the selling company to render engineering service directly to the customer to assure the securing of the order. Accordingly, new formulae were devised for determining the profit due the party into whose territory the shipment was made in order to compensate the selling company for the clerical and engineering service rendered.

It was also agreed that, with regard to any direct inquiries or purchase orders received by either company from the territory of the other, such orders or inquiries would be referred to that company for instructions.

17. The defendant and the co-conspirators, "Limited" and "Francaise," have adhered to and enforced the agreements set forth in Findings 12, 13 and 16 herein. The defendant has performed those acts and has adopted those policies which it was obligated to do pursuant to the specified provisions of the agreements as set forth in Findings 12, 13 and 16 herein.

18. In fulfillment of its obligations under the agreements with "Limited" and "Francaise," the defendant has imposed upon its customers and dealers contractual obligations not to export products purchased from it into the territory of "Limited" and "Francaise." The defendant rejects orders and requests for quotations from its customers whenever it suspects that the order is to be shipped into the territory of either "Francaise" or "Limited" and refers such customers either to "Francaise" or "Limited." This practice of the defendant has substantially affected the foreign commerce of its customers.

19. Although the defendant's answer alleges that the restrictive agreements were "reasonable and necessary for the protection of the business and good will sold," the defendant failed to establish this defense. Moreover, the defendant failed to establish that the agreements were subordinate to the alleged lawful purpose. The evidence establishes that the restrictive agreements were designed to eliminate competition between the parties and with outsiders in all markets of the world, and were neither measurable by, limited to, nor subordinate to the reasonable necessities of the sale.

20. The restrictive arrangements between the defendant and the co-conspirators, "Limited" and "Francaise," are in unreasonable restraint of the interstate and foreign commerce of the United States in prismatic glassware and appliances containing prismatic glassware.

21. The intended effects of the agreements between the defendant and the co-conspirators will continue unless prevented by this Court.

CONCLUSIONS OF LAW.

1. The court has jurisdiction of the subject matter hereof and of the defendant, and the complaint states a cause of action against the defendant under the provisions of the Act of July 2, 1890, entitled "an Act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act, 15 U. S. C. 1 et seq.

2. Beginning in or about 1925 and continuing at all times thereafter to the date of these findings, the defendant and the co-conspirators have been continuously engaged in a combination and conspiracy in restraint of trade and commerce in prismatic glassware and illuminating appliances containing prismatic glassware among the several states of the United States and with foreign nations and have been and are now parties to contracts, agreements and understandings in restraint of such trade and commerce; all in violation of Sect. 1 of the Sherman Act.

3. Plaintiff is entitled to a decree.

UNDERWOOD,

Chief Judge, U. S. District Court.

APPENDIX B.

MEMORANDUM.

This cause came on to be considered upon the Motions of the defendant for a New Trial, to Admit Additional Testimony for Amendment of and for Additional Findings of Fact and Conclusions of Law, for Altering or Amending the Judgment, and upon defendant's Supplemental Motion for Altering or Amending the Judgment.

The Court having carefully considered the same, and being fully advised in the premises, finds as follows:

The Motion for a New Trial is not well taken and should be OVERRULED.

The Motion to Admit Additional Testimony is not well taken and should be OVERRULED.

The Motion for Amendment of and for Additional Findings of Fact and Conclusions of Law is not well taken and should be OVERRULED.

Branch 1 of the Motion for Altering or Amending the Judgment is well taken and should be SUSTAINED. Branches 2 and 3 of said motion are not well taken and should be OVERRULED.

The Supplemental Motion for Altering or Amending the Judgment is not well taken and should be OVERRULED.

Entry accordingly.

UNDERWOOD,

Chief Judge, U. S. District Court.

APPENDIX C.

ORDER.

The Court by Memorandum filed February 9, 1955 having found that

The defendant's Motion for a New Trial is not well taken and should be OVERRULED;

The defendant's Motion to Admit Additional Testimony is not well taken and should be OVERRULED;

The defendant's Motion for Amendment of and for Additional Findings of Fact and Conclusions of Law is not well taken and should be OVERRULED;

Branch 1 of the defendant's Motion for Altering or Amending the Judgment is well taken and should be SUSTAINED, Branches 2 and 3 of said motion are not well taken and should be OVERRULED;

The Supplemental Motion for Altering or Amending the Judgment is not well taken and should be OVERRULED:

IT IS SO ORDERED.

UNDERWOOD,

Chief Judge, U. S. District Court.

APPENDIX D.

JUDGMENT AND DECREE.

Pursuant to the findings of fact and conclusions of law filed herein, it is HEREBY ORDERED, ADJUDGED AND DECREED:

I.

This Court has jurisdiction of the subject matter hereof and of defendant, and the complaint states a cause of action against defendant under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended, commonly known as the Sherman Act.

II.

As used in this judgment:

A. "Prismatic glassware" means glass products generally in the form of lenses, refractors or reflectors, bearing configurations or prisms in the form of lines or circles or both, which are designed to control the distribution and direction of artificial light.

B. "Illuminating appliances containing prismatic glassware" means lighting fixtures employing prismatic glassware to control the distribution and direction of artificial light, commonly used in institutional, commercial and industrial structures and in street and traffic lighting.

C. "Said products" means prismatic glassware and illuminating appliances containing prismatic glassware, or either of them.

D. "Defendant" means The Holophane Company, Inc., a corporation organized and existing under the laws

of the State of Delaware, and maintaining offices in New York, New York, and a factory in Newark, Ohio.

E. "Limited" means Holophane Limited, a joint stock company organized and existing under the laws of the United Kingdom, with offices and principal place of business in London, England.

F. "Francaise" means Law Societe Anonyme Francaise Holophane, a corporation organized and existing under the laws of France, with offices and principal place of business in Paris, France.

G. "Person" means an individual, partnership, firm, association, corporation, or other business or legal entity.

H. "The territory of the defendant" means the continents of North and South America, the islands adjacent thereto, the Philippine Islands and Japan.

I. "The territory of Limited and Francaise" means all areas of the world other than those set forth above as the territory of the defendant.

III.

The provisions of this judgment applicable to defendant shall apply to the defendant, its officers, agents, servants, employees, attorneys, subsidiaries, successors and assigns and all other persons acting under, through or for the defendant who receive actual notice of this judgment by personal service or otherwise.

IV.

Defendant has violated Section 1 of the Act of Congress of July 2, 1890, 15 U. S. C., Section 1. Said violation has consisted of defendant and its co-conspirators, Limited and Francaise, engaging in an unlawful combination and

conspiracy, and being parties to unlawful contracts, agreements, and understandings, in restraint of trade and commerce in prismatic glassware and illuminating appliances containing prismatic glassware among the several states of the United States and with foreign nations.

V.

Each of the following agreements is hereby declared and adjudged to be illegal and in violation of Section 1 of the Sherman Act, and is hereby declared to be cancelled; and the defendant is hereby enjoined and restrained from further performance or enforcement of any of the provisions of said agreements and any agreements amendatory thereof or supplemental thereto:

(a) Agreement dated September 15, 1925, between Holophane Limited and The Holophane Glass Company, Inc., and Holophane Illuminating Company, Inc., commonly referred to as the "Trading Agreement";

(b) Agreement dated as of September 15, 1923, between Holophane Glass Company, Inc., and Law Societe Anonyme Francaise Holophane, commonly referred to as the "Trading Agreement";

(c) Agreement dated February 1, 1944, between the defendant and Holophane Limited, which modified the "Trading Agreement" referred to in (a) above;

(d) Agreement dated June 11, 1945, between the defendant and Holophane Limited entitled "Intercompany Buying Agreement."

VI.

Defendant is hereby enjoined and restrained from entering into, performing, enforcing, adopting, adhering to, maintaining or furthering, directly or indirectly, or

claiming any rights under any contract, agreement, arrangement, understanding, plan or program for the purpose of or with the effect of continuing, reviving, or renewing any of the agreements listed in Section V of this Judgment.

VII.

Defendant is hereby enjoined and restrained from entering into, performing, adopting, adhering to, maintaining, or furthering directly or indirectly, or claiming any rights under any combination, conspiracy, contract, agreement, arrangement, understanding, or concerted plan of action with "Limited" or "Francaise" or any officer, director, employee, agent, sales representative, distributor, subsidiary, successor or assigns of said "Limited" or "Francaise" or any person, firm, or corporation acting directly or indirectly for or on behalf of said "Limited" or "Francaise":

(a) To allocate or divide territories or markets for the production, sale or distribution of said products;

(b) To refrain from competing or to leave any person free from competition in any territory or market in the production, sale, or distribution of said products;

(c) To take any steps or to use any means designed to hinder, limit, restrain or prevent the importation into or exportation from the United States of said products.

VIII.

Defendant is hereby enjoined and restrained from:

A. Granting or receiving any license, immunity or other rights under any foreign patent or patents except upon a non-exclusive basis;

B. Agreeing to exchange patents, trade-marks, trade-names, technological information or know-how, or commercial information in any country with Limited or Francaise;

C. Agreeing to refrain from seeking patent, trade-mark or trade-name protection in any country;

D. Granting or receiving any technological information or know-how to or from any foreign person except upon a non-exclusive basis;

E. Granting any person rights under trade-marks or trade-names in any foreign country where the purpose or effect of such grant is to interfere with the exportation from the United States to such foreign country of goods manufactured by the defendant.

F. Receiving from any person rights under trade-marks or trade-names in any country where the purpose or effect of such receipt is to interfere with the importation into such country of goods manufactured by the grantor of such rights.

IX.

Defendant is hereby enjoined and restrained from:

A. Referring any order or inquiry or request for literature relating to said products to "Limited" or "Francaise" or any subsidiary, agent, sales representative or distributor thereof;

B. Selling or offering to purchase said products from "Limited" or "Francaise" at preferential prices, discounts, or terms and conditions of sale where the purpose and effect of such action is to restrict competition in any territory or market in the production, sale, or distribution of such products.

C. Offering or paying to, or receiving or accepting from "Limited" or "Francaise" any commission, rebate, penalty, or other payment in connection with the sale or other distribution of said products to any other person in any territory or market where the purpose and effect of such action is to restrict competition in any territory or market in the production, sale or distribution of such products.

D. Utilizing "Limited" or "Francaise" or any person who is a distributor or agent of either as a distributor in any foreign country;

E. Acting as a distributor or agent of "Limited" or "Francaise" in any country;

F. Refusing to sell said products to any person at prices and on terms and condition of sale corresponding to those regularly offered to purchasers of the same classification for use or resale in defendant's territory, where a reason for such refusal is that such goods are for use or resale in the territory of "Limited" or "Francaise."

X.

Defendant is ordered and directed:

A. To cancel and terminate in all contracts and agreements with and invoices to customers and distributors such provisions as restrict or prevent said customers or distributors from reselling said products in any foreign country;

B. To notify all its customers and distributors that the defendant does not restrict or restrain the exportation or resale of said products manufactured or sold by the defendant in or to any foreign country;

C. To send a letter of notification to "Limited" and "Francaise" enclosing a copy of this Judgment and in-

forming the aforesaid companies that they are no longer obligated not to export goods to any country included in the territory of the defendant, including the United States.

D. To file a report with the Clerk of this Court within three months from the date of this Judgment, showing action taken in compliance with the terms of this Paragraph X.

XI.

Defendant is ordered and directed:

A. To use reasonable efforts to promote the sale and distribution of said products in foreign markets, including the territories of "Limited" and "Francaise." Nothing contained in this paragraph shall be construed as requiring the defendant to export any such products in violation of the valid patent or trade-mark or trade-name rights of any person in any foreign country.

If, because of such rights, such exportation can be made into certain countries only by means of unmarked glass or the adoption of another trade-mark or trade-name for such exportation, then the defendant shall, within one year from the date hereof, have available sufficient quantities of unmarked glass or glass marked with a new trade-mark to be distributed under a new trade-name, if necessary, to meet reasonable anticipated foreign demand.

B. To offer said products for sale and export to the territories of "Limited" and "Francaise" at prices and upon terms and conditions of sale not discriminatory as compared to those offered to purchasers for use or re-sale in the United States.

C. To take the following specific steps to promote and develop export sales of said products:

(1) To circularize within one year from the date of this Judgment known potential distributors of said

products in the territory of "Limited" and "Francaise," seeking to employ their services in selling and distributing said products.

(2) Beginning six months from the date of this Judgment and for a period of five years thereafter, to insert advertisements at reasonable intervals in trade journals of appropriate circulation in all countries in which said products manufactured by "Limited" or "Francaise" are sold in substantial quantities, of the manufacture and availability for sale of said products.

(3) To circularize within one year from the date of this Judgment all persons who from January 1, 1948 to date of this Judgment have made written inquiry to the defendant respecting the purchase or distribution of said products, exported to any country in the territory of "Limited" or "Francaise" informing them of the manufacture and availability for sale of said products.

(4) To respond in writing to all persons who from the date of Judgment make written inquiry to the defendant respecting the purchase or distribution of said products for export to the territory of "Limited" of "Francaise," advising them of the manufacture and availability for sale of said products.

D. To file a report with the Clerk of this Court each year for a period of five years from the date of this Judgment, showing action taken in compliance with the terms of this Paragraph XI.

XII.

For the purpose of securing compliance with this Judgment and for no other purpose, duly authorized representatives of the Department of Justice, shall, upon

written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to the defendant, made to its principal office, be permitted, subject to any legally recognized privilege, (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Judgment or as otherwise required by law.

XIII.

Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

/s/ UNDERWOOD,

Chief Judge,

United States District Court.

STIPULATION.

We, the attorneys for the respective parties, do hereby stipulate that the Judgment and Decree heretofore entered on February 8, 1954, may be amended by striking that portion of the Judgment and Decree on page 6 thereof designated as XI A. and substituting therefor the following:

> A. To use reasonable efforts, including but not limited to the use of present or subsequent distributors or wholly-owned subsidiaries, to promote the sale and distribution of said products in foreign markets, including the territories of "Limited" and "Francaise." Nothing contained in this paragraph shall be construed as requiring the exportation by the defendant of any such products in violation of the valid patent or trade-mark or trade-name rights of any person in any foreign country. If, because of such valid patent or trade-mark or trade-name rights, such exportation can be made into certain countries only by means of unmarked glass or the adoption of another trade-mark or trade-name for such exportation, then the defendant shall, within one year from the date hereof, have available sufficient quantities of unmarked glass or glass marked with a new trade-mark to be distributed under a new trade-name, if necessary, to meet reasonable anticipated foreign demand.

It is further stipulated that defendant may, and it does hereby, withdraw that portion of its Supplemental Motion For Altering Or Amending The Judgment relating to said paragraph XI A. and found in branches 2 and 3 of said Supplemental Motion For Altering Or Amending The Judgment.

/s/ ROBERT B. HUMMEL,
/s/ NORMAN H. SEIDLER,
Attorneys for the United States.

/s/ RICHARD F. STEVENS,
/s/ SHEPARD BROAD,
/s/ LEWIS HORWITZ,

Attorneys for Holophane Company, Inc.

Date:

It is so ordered:

UNDERWOOD,

United States District Judge.

INDEX

	Page
Statement	1
Argument	6
Conclusion	9

CITATIONS

Cases:

International Salt Co. v. *United States*, 332 U.S. 392	8
United States v. *American Tobacco Co.*, 221 U.S. 106	7
United States v. *National Lead Co.*, 63 F. Supp. 513, affirmed, 332 U.S. 319	6
United States v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, affirmed, 341 U.S. 593	7
United States v. *U.S. Gypsum Co.*, 340 U.S. 76	9

Statute:

Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1:	
Section 1	1-2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 132

HOLOPHANE COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

MOTION TO AFFIRM PORTIONS OF THE JUDGMENT

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellee United States of America moves that paragraphs I through X inclusive, XII and XIII of the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered February 8, 1954,[1] by the district court in favor of the United States in a suit to enjoin viola-

[1] The judgment was amended pursuant to a stipulation which the court approved on February 9, 1955.

tions of Section 1 of the Sherman Act. The Court held that appellant, a manufacturer of prismatic glassware and illuminating appliances containing prismatic glassware, had since 1925 been engaged in a combination and conspiracy, and had been a party to contracts, agreements, and understandings, in restraint of interstate and foreign trade and commerce. The restraint involved the allocation of world markets among appellant and the non-party co-conspirators, Holophane Limited ("Limited"), a British company, and La Societe Anonyme Francaise Holophane ("Francaise"), a French company.

The pertinent facts, as found by the district court, are as follows:

In 1925, one Mygatt held a controlling stock interest in both Limited and Francaise. Limited held all the stock of Holophane Glass Co., Inc., an American company (Fdg. 9, Jurisdictional Statement, p. 20).[2] The management of Holophane Glass Co. organized appellant's predecessor, and through it purchased the Holophane Glass Co. from Limited. (Fdgs. 10-11, Jurisdictional Statement, p. 21). Immediately thereafter, appellant's predecessor and Limited entered into an agreement (of indefinite duration) under which each party was given certain designated areas of the world as its exclusive

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[2] Mygatt, an American, had organized the original Holophane Glass Co. in New Jersey in 1898. In 1912 he formed Limited, and transferred to it his Holophane Glass Co. stock (Jurisdictional Statement, p. 6).

trading territory.[3] The agreement further provided that each party would prevent the exportation of products manufactured by it from its territory into the territory of the other, would not apply for or obtain patent or trade-mark protection in the territory of the other, and would communicate and assign to the other every invention, design, discovery or improvement and trade-mark. (Fdg. 12, Jurisdictional Statement, pp. 21-22). In 1926 appellant's predecessor entered into a similar agreement with Francaise (Fdg. 13, Jurisdictional Statement, p. 23).

The agreement between appellant and Limited was modified in 1945 to permit each party, *at the request of the other,* to ship to and invoice directly a customer located in the other's territory, and to render engineering service directly to such customer (Fdg. 16, Jurisdictional Statement, pp. 25-26). It was further provided that any inquiry or order received by either company from the territory of the other would be referred to that company for instructions (*ibid.*).

Appellant, Limited and Francaise have "adhered to and enforced" the foregoing agreements (Fdg. 17, Jurisdictional Statement, p. 26). "In fulfillment of its obligations" thereunder, appellant has imposed upon its customers and dealers "contractual obligations not to export products purchased from it into the territory of 'Limited' and

[3] The agreement was modified in 1944 to give appellant additional territory as its exclusive area (Fdg. 16 (b), Jurisdictional Statement, pp. 24-25).

'Francaise'," and has rejected orders and requests for quotations from its customers whenever it suspects that the order is to be shipped into the territory of Francaise or Limited (Fdg. 18, Jurisdictional Statement, p. 26).

The restrictive agreements were "designed to eliminate competition between the parties and with outsiders in all markets of the world" (Fdg. 19, Jurisdictional Statement, p. 26), and are in unreasonable restraint of the interstate and foreign commerce of the United States (Fdg. 20, Jurisdictional Statement, p. 27). Appellant failed to establish its contention that the agreements were "reasonable and necessary for the protection of the business and good will sold" in 1925 when Limited sold Holophane Glass Co. (Fdg. 19, Jurisdictional Statement, p. 26).

The judgment of the court, among other things, adjudicates that appellant has violated Section 1 of the Sherman Act (Par. IV, Jurisdictional Statement, pp. 31-32); cancels the restrictive agreements and enjoins appellant "from further performance or enforcement" thereof (Par. V, Jurisdictional Statement, p. 32) or "claiming any rights" thereunder (Par. VI, Jurisdictional Statement, pp. 32-33); prohibits appellant from engaging in various restrictive practices relating to foreign patents and trade-marks (Par. VIII, Jurisdictional Statement, pp. 33, 34); and requires appellant (1) to terminate its contractual provisions prohibiting customers or distributors from selling its product in a foreign country, (2) to advise its customers and distribu-

tors that it does not restrict the exportation of its products, and (3) to send a copy of the judgment to Limited and Francaise and inform them that they are no longer obligated not to export to appellant's territory (Par. X, Jurisdictional Statement, pp. 35-36).

In addition, Paragraph XI (Jurisdictional Statement, pp. 36-37, 39) requires appellant to take certain affirmative steps to compete in the territories of Limited and Francaise. It directs appellant to "use reasonable efforts, including but not limited to the use of present or subsequent distributors or wholly-owned subsidiaries, to promote the sale and distribution" of its products in "foreign markets, including the territories of 'Limited' and 'Francaise'."[4] It also requires appellant to circularize "known potential distributors" within the territories of Limited and Francaise "seeking to employ their services in selling and distributing" its products, to insert advertisements in trade journals in all countries in which Holophane products manufactured by Limited or Francaise are sold in "substantial quantities", and to advise all persons within

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[4] Appellant is required to offer its products for sale and export to the territories of Limited and Francaise at prices and upon terms which are not discriminatory as compared to those offered within the United States (Par. XIB, Jurisdictional Statement, p. 36). Appellant is not required to export its products in violation of a valid foreign patent or trade-mark, but is required, if such patent or trade-mark would bar exportation, to have available within one year sufficient quantities of unmarked glass or glass marked within a new trade name to meet "reasonable anticipated foreign demand' (Par. XIA, Jurisdictional Statement, p. 39).

the territories of Limited and Francaise from whom it has received inquiry since January 1, 1948 that its products are now available for sale or export to such territories (Par. XIC, Jurisdictional Statement, pp. 36-37).

ARGUMENT

1. The principal issue on this appeal (presented by appellant's questions 5, 6 and 7) is whether a district court, upon finding that an American company has conspired with foreign companies (which are not before the court) to divide world markets in violation of Section 1 of the Sherman Act, has the power to direct the American company affirmatively to compete in the foreign territories which had been allocated to its co-conspirators. That is an important question in the administration of the antitrust laws which this Court has not specifically decided, and we do not oppose the noting of probable jurisdiction of that portion of the appeal which seeks review of Paragraph XI of the judgment.

2. We submit, however, that the other questions —none of which appellant argues in its Jurisdictional Statement—present no substantial issue. Questions 1 through 3 challenge the court's conclusion that appellant has violated the Sherman Act. But it is well settled that "a combination of competitors, which by agreement divides the world into exclusive trade areas, and suppresses all competition among the members of the combination, offends the Sherman Act." *United States* v. *National Lead*

Co., 63 F. Supp. 513, 523 (S. D. N. Y.), affirmed, 332 U.S. 319; *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 307 (N. D. Ohio), affirmed, 341 U.S. 593; *United States* v. *American Tobacco Co.*, 221 U.S. 106, 182. The court's findings (see *supra*, pp. 2-4)—which appellant does not challenge—plainly establish that appellant was a party to just such a combination. Appellant's suggestion (Questions 1 and 3) that the restraints were justifiable as ancillary to the sale of a business (the 1925 sale by Limited of Holophane Glass Co. to appellant's predecessor) is patently untenable and is fully answered by the court's finding (Fdg. 19, Jurisdictional Statement, p. 26) that the restrictive agreements were "designed to eliminate competition between the parties and with outsiders in all markets of the world, and were neither measurable by, limited to, nor subordinate to the reasonable necessities of the sale."

Similarly without substance is appellant's challenge (question 4) to Paragraph VIIIB of the judgment (Jurisdictional Statement, p. 34), which prohibits appellant from agreeing to exchange patents, trade-marks, trade names and technical information in any country with Limited or Francaise. One of the terms of the cartel agreements was that each party was to "communicate and assign" to the other every "invention, design, discovery or improvement and trade-mark" (Jurisdictional Statement, p. 22). This provision obviously was designed to and did aid the enforcement of the territorial divisions. Pooling guaranteed that there

would be no serious competition in the character of the product offered by the respective conspirators and no customer incentive to look beyond the chosen supplier. The district court cancelled the basic agreements under which the territorial allocations were maintained, and we submit that it was a proper exercise of the court's broad discretion to "effectively pry open to competition a market that has been closed by defendants' illegal restraints"[5] for it also to prohibit, for the future, one of the means by which these basic agreements were implemented. The fact that Limited and Francaise will no longer automatically have the benefit of appellant's technical developments, and vice versa, undoubtedly will stimulate competition between them.

[5] *International Salt Co.* v. *United States,* 332 U.S. 392, 401.

CONCLUSION

Since the only questions of substance presented by this appeal relate to Paragraph XI of the judgment, the remaining paragraphs should be affirmed.[6]

Respectfully submitted,

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JULY, 1955.

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[6] In *United States* v. *U. S. Gypsum Co.*, 340 U.S. 76, the Court under similar circumstances affirmed a part of the judgment. The district court had granted the Government's motion for summary judgent, and both the company and the Government appealed, the company on the ground that summary judgment was improper, and the Government on the ground that the relief was inadequate. On its own motion, this Court dismissed the company's appeal (339 U.S. 959), noted probable jurisdiction of the Government's appeal, and affirmed Article 3 of the decree, which adjudicated that the defendants had violated the Sherman Act (339 U.S. 960).

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